May 1990 forwarded to the solicitors for the company cheques for payment of the rent for April and May 1990 at the rate of $11,000 per month and also the additional deposit to be held by the company under the new or fresh tenancy. The company did not appear to have rejected these payments. It was submitted by counsel for the defendants that the company had accepted these payments; that thereafter there was no dispute on the amount of rent payable, and that the plaintiff as the successor in title of the company was bound by such acceptance. But there was no evidence that the company or the plaintiff had accepted such payments. At or about the time the company clearly disputed that the rent had been properly determined by Colliers Tan under cl 4(3) and had not accepted the determination. Subsequently, the solicitors for the plaintiff in their letter of 13 June 1990 clearly indicated that the rent to be determined by Colliers Tan was not acceptable. This argument of counsel, again, has no merit and must fail.

On the question of costs, I was not disposed to give to the plaintiff the entire costs. He had in the originating summons sought various reliefs, which he subsequently abandoned. One half of the costs in the circumstances would be justified, and I so ordered.

Application allowed.

Solicitors: *G Raman & Partners; Madhavan Louis & Partners.*

Reported by *Teoh Ai Lin*

Management Corporation of Grange Heights — Strata Title No 301 v Lee Tat Development Pte Ltd

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 404 OF 1989
COOMARASWAMY J
5 DECEMBER 1990

Land Law — Right of way over servient tenement — Interference of enjoyment — Whether owners of dominant tenement entitled to do so — Whether amalgamation of two lots extinguishes right

The plaintiffs are the management corporation of the land and premises known as Grange Heights erected on the land known as lot 687 of Town Subdivision XXI. Lot 687 is an amalgamation of two separate lots, namely, lot 111-33 and lot 561. The defendants are the owners of lot 111-32 and 111-33. Adjoining these lots is lot 111-31 ('the servient tenement'), a private road providing access to these lots from Grange Road. Over the servient tenement is a right of way vested by grants to the plaintiffs and the defendants. The residents of Grange Heights have since 1976 been using the servient tenement as a footpath for gaining access to and from Grange Road.

On 25 April 1989, the defendants caused to be erected an iron gate across the Grange Road end of the servient tenement and a fence across the Grange Heights end thereof, thus closing the right of way and preventing or interfering with the residents' use of the servient tenement for gaining access to and from Grange Road. The plaintiffs instituted proceedings against the defendants and obtained an interim injunction. The defendants applied for the injunction to be withdrawn.

Held, dismissing the defendants' application:

(1) The plaintiffs' right of way is derived from or based on the right of way given to them as owners of lot 111-34. That lot number has been extinguished and the parcel of land has become and is a part of larger parcel of land known as lot 687. However, the land is still there and the right of way which runs with the land remains intact. The amalgamation of lots 111-34 and 561 into one lot is only for the purposes of survey and issue of documents of title. It does not destroy or extinguish the right of way which runs with the land and enures to the benefit of the owners for the time being of the land. Accordingly, the plaintiffs as owners of the land still have the right of way over the servient tenement, and the defendants in erecting the gate and the fence have interfered with the plaintiffs' right of way.

(2) The defendants are not the owners of the servient tenement but enjoy a right of way over it. They are entitled to take necessary steps to protect their right of way and have recourse to legal remedy against any interference of their enjoyment of that right. However, they are not entitled to erect the gate and fence as they did and close the right of way, which they have in common with others. They have not shown that they are entitled to do so.

[*Editorial Note*: The defendants have appealed to the Court of Appeal vide Civil Appeal No 131 of 1990.]

Cases referred to

1 *Collin Development (Pte) Ltd* v *Hong Leong Holdings Ltd* [1976] 1 MLJ 164; [1976] 2 MLJ 149 (refd)
2 *Pickwick International Inc (GB) Ltd* v *Multiple Sound Distributors Ltd* [1972] 3 All ER 384 (refd)

Raj Singham (*Ong Chee Kuan* with him) for the plaintiffs.
Jimmy Yap (*Charles Lin* with him) for the defendants.

Cur Adv Vult

Coomaraswamy J: The plaintiffs are the management corporation of the land and premises known as Grange Heights which consist of three blocks of high-rise apartments, swimming pool, changing room, tennis court and garden, all of which are erected on the land known as lot 687 of Town Subdivision XXI. Lot 687 is an amalgamation of two separate lots, namely, lot 11-34 and lot 561. Roughly, on lot 111-34 stand the tennis court and the changing room, and on lot 561 stand the three blocks of apartments and the swimming pool.

The defendants are the owners of lot 111-33 of Town Subdivision XXI, which adjoins lot 111-34; the defendants are also owners of lot 111-32 which is next to lot 111-33 and abuts Grange Road. Adjoining these lots, namely, 111-34, 111-33 and 111-32, is lot 111-31 which is a long, narrow but irregular strip of land leading to Grange Road; it is, in effect, a private road providing access to these lots from Grange Road. Over

lot 111-31 is a right of way vested by grants to the owners of lots 111-34, 111-33 and 111-32. I shall refer to lot 111-31 as the servient tenement. It is not in dispute that the defendants are not the owners of the servient tenement. The owners of the servient tenement used to be a company called Mutual Trading Ltd which had, in 1919 or thereabouts, gone into liquidation and, presumably, had been dissolved.

Before Grange Heights was developed, both lots 111-34 and 561 were owned by Hong Leong Holdings Ltd in fee simple. In connection with the development Hong Leong Holdings Ltd applied for and obtained an amalgamation of these two lots into lot 687. Grange Heights was developed and completed sometime in 1976, and since its completion, the residents of Grange Heights have been using the servient tenement as a footpath for gaining access to and from Grange Road. This fact is not disputed by the defendants. Nor, it seems to me, was it in dispute that the defendants were at all material times aware that the owners of lot 111-34 have a right of way over the servient tenement. Over the period, approximately between 1972 and 1975, Hong Leong Holdings Ltd and the defendants (formerly known as Collin Development (Pte) Ltd) were involved in litigation in respect of the right of way over the servient tenement: see *Collin Development (Pte) Ltd* v *Hong Leong Holdings Ltd.*[1]

On 25 April 1989, the defendants caused to be erected an iron gate across the Grange Road end of the servient tenement and a fence across the Grange Heights end thereof, thus closing the right of way and preventing or interfering with the residents' use of the servient tenement for gaining access to and from Grange Road. The plaintiffs thereupon instituted these proceedings against the defendants seeking an injunction and damages. Soon after these proceedings were instituted, the plaintiffs applied ex parte for an interim injunction.

There was nothing the defendants could do that would defeat the plaintiffs' purpose if the defendants had notice of the plaintiffs' application. Before hearing the application in substance, I directed the plaintiffs' solicitors to serve the papers on the defendants' solicitors.

I also asked the plaintiffs' solicitors to notify the defendants' solicitors that I would hear the application at 3pm the next day and that the defendants' solicitors could attend the hearing and be heard. In taking these steps, I was initiating an 'opposed ex parte hearing' as described by Megarry J in *Pickwick International Inc (GB) Ltd* v *Multiple Sound Distributors Ltd.*[2] After hearing the parties, I granted the interim injunction. Subsequently, the defendants applied for the injunction to be discharged, and this application is now before me. Before me also are the prayers in the initiatory application in these proceedings, namely, the originating summons.

The question before me is whether the defendants are entitled to erect the gate at one, and, the fence at the other end of the servient tenement or do similar acts to prevent the residents of Grange Heights from using the servient tenement for gaining access to and from Grange Road. The question turns on the rights of the plaintiffs and the defendants and the extent of such rights over the servient tenement. It is common ground that the plaintiffs as the owners of lot 111-34 and the defendants as owners of lots 111-33 and 111-32 have a right of way over the servient tenement, which was granted to them or their predecessors in title, and the right of way was expressed in the following terms:

> And together with full and free right and liberty for the purchaser his executors administrators and assigns being the owner or owners for the time being of the land hereby conveyed or any part thereof and their tenants and servants and all other persons authorized by him or them in common with others having a similar right from time to time and at all times hereafter at his and their will and pleasure to pass and repass with or without animals and vehicles, in along and over (lot 111-31).

Plainly, the plaintiffs' right of way is derived from or based on the right of way given to them as owners of lot 111-34. The number 111-34 is no longer the lot number for that parcel of land; that number has been extinguished and the parcel of land has become and is a part of larger parcel of land known as lot 687. However, the land is still there and the right of way which runs with the land remains intact. The amalgamation of lots 111-34 and 561 into one lot known as lot 687 is only for the purposes of survey and issue of documents of title. It does not destroy or extinguish the right of way which runs with the land and enure to the benefit of the owners for the time being of the land. Accordingly, in my judgment, the plaintiffs as owners of the land, formerly known as lot 111-34 but now a part of lot 687, still have the right of way over the servient tenement, and the defendants in erecting the gate and the fence have interfered with the plaintiffs' right of way.

The defendants have not complained, and it is not their case, that there has been excessive use of the servient tenement by the residents of Grange Heights. Hence, the question of excessive use of the servient tenement does not arise.

I now turn to the right of the defendants. The defendants are not the owners of the servient tenement; they are the owners of the dominant tenements, namely, lots 111-33 and 111-32 and enjoy a right of way over the servient tenement. They are entitled to take necessary steps to protect their right of way and have recourse to legal remedy against any interference of their enjoyment of that right. However, they are not entitled to erect the gate and fence as they did and close the right of way, which they have in common with others. They have not shown to me that they are entitled to do so.

They are not complaining of any interference of their rights of way by the plaintiffs or any residents of Grange Heights. That is certainly not their case here.

In the result, the application for discharge of the interim injunction is dismissed with costs. The substantive application in the originating summons is allowed, and I grant to the plaintiffs the injunction asked for and further order that the defendants remove the iron gate across the Grange Road end of the servient tenement and the fence across the Grange Heights end thereof. The plaintiffs will have costs of these proceedings. These costs shall include the costs of hearings when the order was for costs in the cause and further, the costs of the hearing by me of the opposed ex parte application on 28 April 1989 when I ordered that the costs shall be reserved to the judge hearing the originating summons.

There are two outstanding matters. In view of the peculiar circumstances and possible new issues arising out of a management corporation bringing this action, I do not wish, without hearing full arguments from each party, to make an order for assessment of damages.

There were committal proceedings in this case and in the light of the decision which I have reached today, Mr Singam raised the point of which party should bear the costs of those committal proceedings.

In the absence of Mr Yap today, I do not wish now to hear arguments on these two matters as it will be unfair to the advocate representing him. I will therefore hear arguments on these two matters upon Mr Yap's return to work. The parties are to ask the registrar for a date.

Application dismissed.

Solicitors: *Drew & Napier; Donaldson & Burkinshaw.*

Reported by *Kevin Mathews*

Wardley Ltd v Town & City Properties Ltd

HIGH COURT (SINGAPORE) — SUIT NO 13 OF 1989
CHAN SEK KEONG J
19 NOVEMBER 1990

Civil Procedure — Statement of claim — Striking out — Abuse of process — Res judicata — Rules of the Supreme Court 1970, O 14, O 18 & O 21

The plaintiffs were the manager of a syndicate of lenders and by two loan agreements which were later supplemented, the lenders made loans to the borrower, BDP. These loans were guaranteed by the defendants. On 13 November 1987 the plaintiffs commenced an action in Suit No 2931 of 1987 against the defendants as guarantor of the aforesaid sum and interest until payment in full. The defendants entered appearance, and after the statement of claim was amended, the plaintiffs applied for summary judgment. The assistant registrar made an order giving conditional leave to the defendants to defend upon provision of a banker's guarantee. The defendants appealed against the decision which was allowed by Chua J and no further step was taken in the proceedings until 24 December 1988 when the plaintiffs filed a notice of discontinuance.

On 4 January 1989 the plaintiffs commenced the present action claiming against the defendants as guarantor the sum of $17,759,049.63 and interest. After the entry of appearance by the defendants, the plaintiffs applied for summary judgment. A dispute arose at the hearing of the O 14 application as to the ground or grounds of Chua J's decision in the previous suit. Counsel for the plaintiffs contended that the judge allowed the appeal on the sole issue of misjoinder of the parties. Counsel for the defendants contended that there were other triable issues. On 10 January 1990, Chua J certified that his order was not based solely on the issue of misjoinder. Hearing was resumed and counsel for the defendants contended that the application was 'res judicata'. However, the defendants were granted unconditional leave to defend and the appeal by the plaintiffs was also dismissed but no reason was recorded for the decisions.

Following that, the defendants took out the present application to strike out the statement of claim pursuant to O 18 r 19 of the Rules of the Supreme Court 1970. Counsel for the defendants again relied on Chua J's certification and again counsel for the plaintiffs contended that res judicata did not apply. The application was dismissed by the assistant registrar. The defendants now appeal.

Held, dismissing the defendants' appeal:

(1) It is not disputed that the plaintiffs had commenced a new action based on counsel's advice that Chua J's decision rested on the issue of misjoinder and that advice was based on a misapprehension of the correct position. If counsel had not been mistaken on this fact the plaintiffs would have been justified to start a new action as a misjoinder is a procedural defect which the plaintiffs were entitled to cure. As to the allegation of the abuse of process, there was no question of a deliberate attempt to bypass Chua J's decision.

(2) In any case the plaintiffs were entitled under the Rules of the Supreme Court 1970 to discontinue any action for any reason whatsoever without the leave of court if they come within the terms of O 21 r 2 which they did. As such the court could not understand why it was an abuse of process for